**BOONSOM BOONYANIT @ SUN YOK ENG**

**v.**

**ADORNA PROPERTIES SDN. BHD.**

HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J
[CIVIL SUIT NO. 22-401-89]
25 APRIL 1995

***LAND LAW:*** *Forged transfer of land - Whether defendant was bona fide purchaser for value without notice - Whether defendant acquired indefeasibility of title and interests - Whether immediate or deferred indefeasibility - Consideration of s. 340(2)(h), (3) National Land Code 1965.*

***EVIDENCE:*** *Memorandum of transfer - Genuineness of signature - Whether opinion of expert necessary - Consideration of s. 45(l) Evidence Act 1950 - Plaintiff failing to call handwriting expert to give evidence - Effect.*

***EVIDENCE:*** *Memorandum of transfer - Legal requirement that document must be attested - Attestor not called to give evidence - Consideration of ss. 68 and 70 Evidence Act 1950 - Proof of execution - Plaintiff admitting execution of memorandum of transfer - Whether sufficient proof of execution.*

***EVIDENCE:*** *Plaintiff alleging forgery of signature in memorandum of transfer - Burden of proof - Whether burden of proof on plaintiff similar to burden in fraud cases - Standard of proof applicable - Consideration of s. 340(2)(a) National Land Code 1965.*

The plaintiff, a Thai national was the owner of two pieces of land (the said land) in Penang. The defendant entered into a sale and purchase agreement to purchase the said land from one Mrs. Boonsoom Boonyanit. The full purchase price was paid by the defendant to the vendor and the duly executed and stamped memorandum of transfer was registered in the name of the defendant. In an action against the defendant, the plaintiff claimed that the name, passport number and signature of the transferor appearing in the memorandum of transfer was not hers and argued that the memorandum of transfer was therefore procured by forgery and/or fraud. The defendant, on the other hand, contended that it was a *bona fide* purchaser for value and that it had acquired an indefeasible title in the said land through the registration of the memorandum of transfer by the vendor.

In the circumstances, the issues before the Court were:

(1) Whether the plaintiff was the proprietor of the said land before the registration of the memorandum of transfer.

(2) The onus and the standard of proof required in cases of forgery.

(3) Whether there was forgery committed on the memorandum of transfer which resulted in the registration of the transfer of the said land in favour of the defendant; and if so

(4) Whether the defendant could nevertheless have acquired indefeasible title over the said land, as a *bona fide* purchaser for value without notice, by virtue of the proviso in s. 340(3) of the National Land Code 1965.

**Held:**

**[1]** Section 68 of the Evidence Act provides that where a document is required by law to be attested, and the memorandum of transfer (referring here to the memorandum of transfer sought to be put in by the plaintiff to prove she was the registered proprietor of the said land) is such a document, it shall not be used in evidence until one attesting witness has been called for the purpose of proving its execution. However s. 70 of the Evidence Act provides that the admission of execution of a document by a party in a document required to be attested "shall be sufficient proof of its execution as against him". Therefore it is clear that the provisions of s. 68, when read with s. 70, are not intended to bar a party who admits to having signed a document from using the document under the general law of evidence.

**[2]** In the circumstances the memorandum of transfer was admissible on general principles of evidence governing the admission of documents. However, the admission, *per se,* of the memorandum of transfer does not free the Court from having to determine its probative value as a document where the attesting witness has not been called to testify. In the light of the production of the memorandum of transfer and the evidence given by the plaintiff and her witnesses and taking into account the fact that the plaintiff had and could produce the assessment and quit rent receipts, there was sufficient evidence to satisfy the Court, on a balance of probabilities, that the plaintiff was the registered proprietress of the said land.

**[3]** Forgery is a specie of fraud and both are inter-related due to the common denominator of both being criminal in nature. Although there are no Malaysian cases concerning the onus of proof required in cases of forgery, as forgery is a specie of fraud under common law, he who alleges forgery should be required to discharge the same probative onus of proof as was established in *M Ratnavale and Chua Choon Moi.* In the circumstances of this case the probative onus on the plaintiff is to prove beyond reasonable doubt that forgery had been committed on the memorandum of transfer. In the present case the evidence adduced by the plaintiff, when considered on the whole, fell short of proof directly on point to show that the signature of the transferor in the memorandum of transfer was not hers.

**[4]** When the Court is called upon to form an opinion as to the identity or genuineness of a handwriting, as in the current case, it is enjoined under s. 45(l) of the Evidence Act to submit itself to the opinions of experts. It is not permissible for the Court to assume the position of a handwriting expert and endeavour on its own to compare the signatures of the transferor in the two documents under consideration, being mindful of the fact that the considerable time lapse of over 22 years spanning the execution of the two documents could by itself produce apparently differing signatures.

**[5]** In the circumstances, the sum total of the plaintiff's evidence may at the very most constitute circumstantial evidence, which may be sufficient to show on the balance of probability that her signature had been forged, but the nature of such evidence, short of independent affirmative evidence, is insufficient to found proof beyond reasonable doubt of the falsity of the signature in the memorandum of transfer.

**[6]** Even assuming the plaintiff was able to prove forgery to the standard required, by virtue of the provisions of s. 340(3) of the National land Code, the defendant had acquired indefeasible title over the said land. The operative words "any purchaser" in s. 340(3) makes clear the legislature's intention to grant immediate and not merely deferred indefeasibility to a purchaser in good faith for valuable consideration.

*[Plaintiff's claim dismissed with costs]*

**Cases referred to:**
*Bater v. Bater [1951] P35* ***(not foll)***
*Nahar Singh v. Pang Hon Chin [1986] 2 MLJ 141* ***(refd)***
*M. Ratnavale v. S. Lourdenadin, M. Mahadevan v. Lourdenadin [1988] 2 MLJ 371* ***(foll)***
*Chua Choon Moi v. Ngan Sew Tin [1986] 1 MLJ 34* ***(foll)***
*Saminathan v. Pappa [1981] 1 MLJ 121* ***(refd)***
*Naravanan v. Official Assignee, Rangoon AIR 1941 PC 93* ***(refd)***
*Tai Lee Finance v. Official Assignee & Ors. [1983] 1 MLJ 81* ***(foll)***
*Waimiha Sawmilling Co. Ltd. v. Waione Timber Company Ltd. [1926] AC 101* ***(foll)***
*Mills v. Stokman [1967] 116 CLR 61* ***(refd)***
*Yorkshire Provident Life Assurance Co. v. Gilbert & Ravington [1895] 2 QB 148* ***(refd)***
*Abdool Hoosein v. Turner LP 14 - 1.A 111* ***(refd)***

**Legislations referred to:**
Evidence Act 1950, ss. 45(1), 68, 70
FMS Land Code, s. 42
National Land Code, Form 14A, ss. 81(3), 3402)(b), (3)
National Land Code (Penang and Malacca Titles) Act 1963, s. 81(3)
Titles to Land (occupation) Ordinance 1949, s. 27

**Other sources referred to:**
*Tenure and Land Dealings in Malay States*, David Wong
*Land Law in Malaysia*, Teoh Keang Sood & Khaw Lake Tee
*National Land Code - A Commentary*, Judith Sihombing, 2nd Edn., p. 817

**JUDGMENT**

**Vincent Ng Kim Khoay J:**

The plaintiff in her statement of claim stated that:

(a) she was at all material times the registered proprietor of all that piece of land known as Lots 3606 and 3607, Mukim 18, Town of Tanjung Bungah, Penang (the said properties) and she resided at No. 181, Soi Samaharn, Sukhumvit Road 4, Bangkok, Thailand;

(b) on or about 24 May 1989, the defendant, a company incorporated in Malaysia, did present or caused to be presented, at the land office for registration, a stamped memorandum of transfer of the said properties purportedly signed by the plaintiff as transferor to the defendant as transferee dated 7 April 1989 and the same was registered on 24 May 1989;

(c) the said memorandum of transfer dated 7 of April 1989 was procured by forgery and/or fraud, in that:

(i) the purported transferor of the said properties was plaintiff;

(ii) the plaintiff did not dispose of the properties nor authorised anyone to dispose of the same on her behalf;

(iii) the plaintiff did not enter into any agreement with the defendant nor executed the said memorandum of transfer in favour of the defendant nor authorised anyone to do the same on her behalf;

(iv) the plaintiff did not affirm a statutory declaration dated 6 April 1989 to effect a change of name from Sun Yok Eng @ Boonsom Boonyanit to Mrs. Boonsoom Boonyanit;

(v) the plaintiff is Mrs. Boonsom Boonyanit holding Thai passport no. D080757 and not the purported transferor holding herself out to be Mrs. Boonsom Boonyanit holding Thai passport no. 033852, as endorsed in the title deeds in respect of the said properties;

(vi) the original title deed of the said properties had, at all material times, been in the possession of the plaintiff but a certified copy thereof was procured by fraud through a false declaration that the original title deed was lost;

Hence, the plaintiff claimed recovery and reinstatement of all her right title and interest in the said properties, and sought the following reliefs from this Court:

(a) for a declaration:

(i) that her right title and interest in and to the said properties is not affected by the purported transfer to the defendant;

(ii) that the transfer in favour of the defendant is void *ab initio*;

(iii) that the plaintiff is the registered owner of the said properties;

(b) for an order that the registrar of land titles do:

(i) cancel the entries or memorials in the register of Land Titles in favour of the defendant; and

(ii) restore the plaintiff's name as the registered owner of the said properties;

(c) Costs; and

(d) Damages - as the plaintiff was by reason of the fraud and/or forgery prevented from disposing of the same.

The defendant in their defence denied:

1. (a) that the plaintiff was the registered proprietor of the said properties;

(b) that the said memorandum of transfer dated 7 April 1989 was procured by forgery and/or fraud as alleged in paragraph 4 of the amended statement of claim and the particulars appended thereto;

(c) all the particulars of fraud and/or forgery set out in the amended statement of claim.

(d) that the plaintiff is entitled to the remedies sought.

And averred that:

2. (a) they were at all material times represented by Messrs Cheong Wai Meng & Van Buerle of Chung Khiaw Bank Building, No. 62 Beach Street, 10300 Penang in the purchase of the said properties and it was the said solicitors who prepared and/or vetted the memorandum of transfer and caused the same to be presented for registration on 24 May 1989 after the transfer had been executed by Mrs. Boonsoom Bonyanit (Thai passport no. 033852) who, at all material times was represented by Messrs Khor, Ong & Company of No. 4563 (top floor), Jalan Kampung Bengali, 12200 Butterworth;

(b) if the said transfer was procured by fraud and/or forgery (which was denied) the defendant did not procure the said transfer by fraud and/or forgery and was not a party to the said alleged fraud and/or forgery;

(c) the defendant was a *bona fide* purchaser of the said properties for value and had acquired an indefeasible title in the said properties through the completion of the sale and purchase agreement dated 15 December 1988 and/or the subsequent registration of the transfer thereof by the said Mrs. Boonsoom Boonyanit (Thai passport no. 033852) in the defendant's favour;

(d) further and/or in the alternative, the defendant's title and interest in the said properties and its proprietorship thereof was acquired for valuable consideration and in good faith and the plaintiff is accordingly not entitled to the remedies sought.

The defendant therefore prayed for a dismissal of the plaintiff's claim with costs.

At the trial the plaintiff herself gave evidence, and called 6 other short witnesses to testify on her behalf, namely Phiensak Sosothikul (PW2 the plaintiff's son), Sam Teng Choon (PW3 - an accountant) Saw Lay Wah (f) (PW4 - a family friend), Ooi Chooi Li (f) (PW5 - former legal assistant in M/s Lim Kean Siew & Co), Saw Wan Lip (PW6 - relative of the plaintiff and Manager of the said properties until 1980) and Pamela Ong Siew Im (PW7 - a senior partner in M/s Lim Kean Siew & Co.). On behalf of the defendant company, evidence was given by the director of the defendant company Fong Wa Tan (DW1), Lim Chan Hwa (DW2 who introduced the said properties to the defendant) and Cheong Wai Meng (DW3 - solicitor and senior partner of M/s Cheong Wai Meng and Van Buerle who prepared the sale and purchase agreement and registered the transfer of said properties on behalf of the defendant).

On the facts, to support her claim the plaintiff gave the following testimony in the Thai language.

She resided at No. 181, Lorong 4, Bangkapit, Bangkok, Ayuthaya since her birth. She held an international passport number D080757 (Exh. P2) effective from 15 March 1985 to 14 March 1990 in which there were four entries which showed that she had entered Malaysia on four occasions namely on 4 March 1988, 3 October 1989, 17 July 1987 and 2 March 1990 and left on 6 March 1988, 4 October 1989, 20 July 1987 and 4 March 1990 respectively. She normally flew straight to Penang and flew back to Thailand. Beside the four occasions that she entered Malaysia under P2 she never made any other trips to Malaysia, though she had made one trip into Malaysia under a previous passport no. S555701, issued on 4 May 1982 and valid only until 3 May 1987 (Exh. Pl). Her name had always been Boonsom and not Boonsoom and she never came to Malaysia alone. She could remember buying a piece of property in Penang and produced to Court three documents: being indenture dated 12 December 1956 in respect of plot B (Exh. P4A) which (according to her) became lot 682, and another indenture dated 12 December 1956 in respect of plot C (Exh. P4B), which became lot No. 1164. She then tendered a memorandum of transfer dated 29 December 1966 under Form 14A of the National Land Code (Exh. P4C). She said that P4C, which superseded P4A and P4B contained her signature and the transfer was registered on 18 January 1967 in her favour as proprietor. She said the surat akuan (surat akuan) dated 18 June 1988 (Exh. P6) - which alleged her title deeds had been lost - was not signed by her and also the statutory declaration (Statutory Declaration) dated 6 April 1989 (Exh. P7) - which declared that Mrs. Boonsoom Boonyanit holding international passport no. 033852 and Sun Yun Eng @ Boonsom Boonyanit in the Advance Certificate of Title in respect of the said properties refer to the one and same person - was also not signed by her and she was never at any time called Mrs. Boonsoom as appears in P7. Most importantly, she testified that the signature

of the transferor in the memorandum of transfer dated 7 April 1989 under Form 14A (Exh. P8) was not hers and the name and passport number in P8 was also not hers, as, at the material time she was holding Thai international passport no. D080757 (P2). She concluded her examination-in-chief with the assertion that she never transferred or sold the said properties to the defendant company and the signature on P8, purported to be hers, was a forgery.

Then, in cross-examination by Mr. Ghazi Ishak, for the defendant, she said that though the name Sun Yok Eng did not appear in Pl or P2, or even in exh. P3 (her international passport no. A151645 issued on 21 March 1990 until 20 March 1995 which she was currently holding) she was nevertheless known by that chinese name in Malaysia and as Boonsom Boonyanit in Thailand where she had been residing since birth. In P4C her Chinese name was used as an alias because the said properties were located in Malaysia. She agreed that her signature in P2 and P3 differed (P2 being in Thai character and P3 in alphabet) but she did not change her signature. In re-examination by her Counsel Mr. Lim Kean Siew, she said that she was born with the name of Sun Yok Eng and had used it when she was very young. And the said properties were given by her husband to her.

Phiensak Sosothikul (PW2), the eldest son of PW1, testified that some time in June 1989 he saw an advertisement in the Thai newspaper dated 11 June 1989 inserted by Messrs Khor, Ong & Company, a law firm, and contacted one Sam Theng Choon (PW3), an accountant, to investigate as the advertisement had referred to his mother's said properties. Thereafter, when PW3 informed him that the law firm Messrs. Khor, Ong & Company could not give him any useful information, he contacted his solicitors, Messrs Lim Kean Siew & Company, for assistance. Then, when told by PW3 that the said properties had been sold fraudulently, he instructed PW3 to instruct Mr. Lim Kean Siew & Company to take the necessary action and also to lodge a police report. He identified the signature in P4C as his mother's signature and said that the name Sun Yok Eng was his mother's Chinese name, as she was originally a Chinese. He also testified that whenever his mother travelled out of Thailand, he always accompanied her. The quit rents and assessments on the said properties were paid regularly by PW3 on his instructions.

He received a certificate from the Royal Thai Consulate General dated 24 December 1993 (Exh. P10) which stated that the name of the holder of Thai passport number N033852 (the passport number stated in P8) had been changed from Mrs. Sima Sangchinda to Mrs. Boonsoom Boonyanit and that passport was thereby a forgery. In cross-examination by Mr. Ghazi Ishak, PW2 said that he could not remember the name of the Thai Consul and that he secured P10 only lately on 24 December 1993. He further said that his mother did not live with him but lived with his sister, about 15 minutes drive away from his house, and he himself had never personally contacted Messrs Khor, Ong & Company concerning the advertisement in Thai language (Exh. P9 with English translation marked Exh. P9A). Lastly, he admitted that when P4C was executed he was not present, but said that the signature in P8 was not the signature of his mother

PW3: Sam Theng Choon, an accountant, testified that from 1983 he paid the assessment and quit rents in respect of the said properties on behalf of PW1, and tendered to the Court eight quit rent receipts in respect of each of the two said properties (marked collectively as exh. P11A and B) and 12 assessment receipts in respect of both of the properties (collectively marked Exh. P12). On 16 June 1989, acting on instructions of PW2 and after some search he located the advertisement in the Star newspaper (Exh.

P13) but encountered difficulty in getting information from Messrs Khor, Ong & Company concerning transfers of the said properties.

PW4: Saw Lay Wah (f), the daughter of Saw Seng Kew confirmed that PW1 was also known as Sun Yok Eng. PW1 and her husband were her father's old friend and whenever the couple came to Penang they used to stay in her family home of No. 87 Cantonment Road, Penang.

PW5: Ooi Chooi Li produced the police report (P14) dated 12 July 1987 which she lodged when she was a legal assistant in the firm of Messrs Lim Kean Siew & Company on the instructions of Pamela Ong Siew Im, and this was confirmed by the latter who gave evidence as PW7. PW7 also said that she was surprised when she found that there was a transfer of the said properties, because if PW1 had wanted to sell same she would have come to see her with PW2, as she could not travel alone.

PW6: Saw Wan Sip, who was the brother-in-law of PW1, testified that the said properties were bought through monies provided by PW1's husband in Bangkok. He was a courier of the money from PW1's husband to the vendor and he looked after the property until around the 1980's.

With the evidence of PW7 the plaintiff closed her case.

The defendant company then opened their case calling Fong Wa Tan (DW1), a director of Adorna Properties Sdn. Bhd, formerly known as Calget Sdn. Bhd. He said that he was the director responsible for the purchase of the said properties. His said company had entered into a sale and purchase agreement dated 15 December 1988 in respect of the said properties with one Sun Yok Eng @ Boonsom Boonyanit (Exh. D15) on the introduction to the transaction by DW2 of Messrs C.A. Lim and G.E. Tan Sdn Bhd. He met DW2 in late October 1988 and after some negotiations he secured an option through Messrs C.A. Lim and G.E. Tan to purchase the said properties at RM22 per square foot. The option was exercised through his solicitors, Messrs Cheong Wai Meng and Van Buerle. His company had paid a total consideration of RM1,865,798 for the said properties. This sum was paid in two payments through M/s Cheong Wai Meng & Van Buerle; 20% of the purchase price being RM373,159.60 was paid upon execution of D15 on 15 December 88 and the balance of RM1,492,638.40 was paid sometime in April 1989, which resulted in the registration of the transfer in respect of the said lands in favour of Calget Sdn. Bhd. At all material times the defendant was represented by Messrs. Cheong Wai Meng and Van Buerle and the vendor was represented by M/s. Khor, Ong & Company. Only after the titles had been duly registered in favour of his company that he became aware of a claim being made by the plaintiff, and he was very surprised and found it difficult to believe that there was an adverse claim.

In cross-examination he said that he had left it to his solicitor to effect the transfers and he was not aware that one Sun Yok Eng @ Boonsom Boonyanit had made a surat akuan dated 18 June 1988 (P6) as he had left it to his solicitor to give him a good title.

In re-examination by Mr. Ghazi he said that at the time of the decision to purchase as well as when the agreement was signed and the subsequent registration of the transfer, he had no knowledge of any adverse claims on the tiles of the said properties by third parties.

DW2: Lim Chan Hwa, a manager of a company, was then called. He confirmed that he was then attached to Messrs. C.A. Lim and G.E. Tan Sdn. Bhd., a company of valuers

and estate agents. The said properties were sold to the defendant through his said company for RM1,867,598 whereby Messrs. Cheong Wai Meng and Van Buerle had acted for the defendants in the preparation of D15 and the registration of the transfers. The said property was introduced to him by Victor Joseph Dass of Messrs Victor Real Estate Agency. At the request of DW1, sometime in July 1988, he did a valuation of the same said properties, though he could not locate the valuation report. It was Victor Joseph who had requested him to find a purchaser for the said properties at the asking price of RM30 per square foot which was eventually negotiated down to and agreed at RM22 per square foot. The option dated 13 November 1988 was given in favour of his company (Exh. D16) by one Sun Yuk Eng @ Boonsom Boonyanit, and this came through the legal firm of Messrs. Khor, Ong & Co under cover of their letter dated 11 November 1988 (Exh. D18). D18 also referred to two Advance Certificates of Title (Perakuan Pendahuluan Mengenai Hakmilik) in respect of the said properties, stated under Form L which he tendered in evidence as exhibits D19A and D19B.

In cross-examination he stated that he did a search in the land registry on the said title during the valuation exercise and the name Sun Yuk Eng appeared in the Municipal Council Assessment Book in respect of the said properties, being lot no. 1164 and 682 which subsequently became lots 3606 and 3607. He admitted that the address recorded in the Municipal Council Assessment Book in respect of the said properties was c/o Lim Ali and Company wherein Sam Theng Choon (PW3) was working and he had called him there. He however said that he did not know Messrs Khor, Ong and Company until he received D18 from the law firm.

DW3: The last witness called by the defendant was Cheong Wai Meng, who was at all material times a senior partner of the firm of Messrs Cheong Wai Meng and Van Buerle. His testimony ran as follows. Sometime in November 1988 he had acted for Calget Sdn. Bhd. in respect of the purchase of the said properties, when DW2 came to see him with the option D16, the letters D17 and D18 and the Advance Certificates of Title D19A and D19B. He then prepared a letter dated 21 November 1988 (Exh. D20) addressed to Messrs Khor, Ong & Company and instructed his staff to conduct a search in the land registry in respect of both the said properties. The result of search under Form D was tendered as exh. D21A and D21B. It was he who prepared D15 (the sale and purchase agreement). On 12 December 1988, under cover of his letter of even date (Exh. D22) he forwarded the deposit of RM373,159.60 and on 17 April 1989 under cover of another letter of even date (Exh. D23) he forwarded the balance sum of RM1,492,638.40 to Messrs Khor, Ong & Company (being the deposit and the balance purchase price respectively) in respect of the said properties. The said properties were thereafter duly registered in favour of Messrs Calget Sdn. Bhd. on 24 May 1989 as proprietor. At all material times when he was dealing with the said properties he was not aware of any adverse claim against them. At all material times, he had acted only for the purchaser whereas the vendor was represented by Messrs Khor, Ong & Company.

Under cross-examination by Mr. Lim, he admitted that when he prepared D15, he did not check P6 or the international passport of the vendor as she was then represented by different solicitors and her international passport number was supplied to him by the vendor's solicitors. He said it was common occurrence to find the name of the title holder in the document of title to be dissimilar or differ from his real name, and this would entail a statutory declaration to correct the name in the title. He said that the Advance Certificate of Title did not disclose that it was a replacement title. Only upon receipt of

the letter dated 12 June 1989, was he made aware of the adverse claim, and he then contacted Messrs Khor, Ong & Company.

In re-examination by Mr. Ghazi, he said as a solicitor it was quite normal to come across cases of lost title deeds where the title holder makes a statutory declaration to apply for a replacement title. To prepare D15, he obtained the name of the vendor from the search and the passport number from the vendor's solicitors, Messrs Khor, Ong & Company. The statutory declaration (P7) must have been prepared by the vendor's solicitors. He was not suspicious when he saw P7 as it was a common practice to amend the names in the title. The cancellation of the name "Sun Yuk Eng nama samaran Boonsom" in P8 appears to have been done by the collector of land revenue as his initials appear therein.

Upon the conclusion of the trial on 21 October 1994, and at the request of both Counsel, due to the intricate and novel points of law involved, I allowed Counsel to put in written submissions within one month thereof. Mr. Ghazi forwarded his written submission on 25 November 1994 whereas Mr. Lim gave his on 27 January 1995 (3 months later), followed on 21 February 1995 by a submission-in-reply of the defendant.

Be it noted that it is common ground that the defendant company, Adorna Property Sdn. Bhd, was formerly registered and known as Calget Sdn. Bhd. It is also conceded by Mr. Lim Kean Siew in his written submission that the plaintiff's claim is based on forgery and not fraud. There was also no serious challenge by the plaintiff that the defendant was a purchaser of the said properties for value without notice. I am pleased to note that, instead of beating around the bush, so to say, Mr. Lim had in his written submission conceded that, the plaintiff was "going on forgery and not fraud" and that the defendant was a *bona fide* purchaser for value without notice of forgery, as he had submitted "We do not press the matter since whether or not the person is innocent does not matter in the case of forgery ..." as "Section 340(2)(b) applies to vitiate the defendants' title, notwithstanding that they were the innocent parties, because they are not subsequent purchaser from a fraudulent title holder ..."

As such this case essentially falls to be determined only on the following issues:

(1) Was the plaintiff the proprietor of the said properties before the registration of memorandum of transfer in P8?

(2) The onus and the standard of proof required in cases of forgery.

(3) Was there forgery committed on P8, which resulted in the registration of the transfer of the said properties in favour of the defendant?

(4) If the answer to (3) above is in the affirmative, whether the defendant could nevertheless have acquired indefeasible title over the said properties by virtue of the proviso in s. 340(3) of the National Land Code, as a *bona fide* purchaser for value without notice?

At the outset of the case, when the Court enquired why there was no agreed bundle, Mr. Ghazi replied that the defendant would not agree to most of the documents in the plaintiff's bundle. Hence, as neither party had sought an adjournment to identify and to compile an agreed bundle of the documents that they had agreed to, the Court directed that since this was a long-standing case, it could nevertheless proceed and the parties could object to the admission of the documents concerned as and when they are tendered. This was the approach I adopted as defendant's Counsel did not specify the admission of which document or documents in the plaintiff's bundle they had intended to object and

thus the plaintiff would only be put on notice that she was required to call the maker thereof (or its attesting witness) as and when such objections are made on each individual document.

It would thus be impermissible for either party (as the defendant here) to select in their submission, only after the close of evidence, the admission of which document they would object to. This situation goes only to demonstrate the imprudence of insisting that trial could proceed in the absence of an agreed bundle.

*On the first issue*

The defendant had contended in his written submission that by virtue of s. 68 of the Evidence Act 1950, the said memorandum of transfer dated 29 December 1966 (P4C) was not admissible as evidence. And, since P4C was intended to be used for rather than against the plaintiff, s. 70 of this Act could not be invoked to absolve her from the statutory requirement of calling the attestor to prove the execution of the document (P4C). The attesting witness in P4C, namely Mr. Lim Huck Aik, was not called to prove its execution and no explanation was given for this.

Section 68 of the Evidence Act provides that where the document is required by law to be attested (and the memorandum of transfer in Form 14A under the National Land Code is such a document) it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. However, s. 70 of the Evidence Act states that the admission of execution of a document by a party in a document required to be attested **"shall be sufficient proof** of its execution as against him". There are no local authorities on the operation of s. 68 read in conjunction with s. 70 of the Evidence Act. Section 70 seems to imply that a document required by law to be attested may still be used as evidence without calling the attesting witness if the party who executed the document had admitted to such execution, as "it shall be sufficient proof of its execution as against him." Thus, when read in conjunction with s. 70**,** it becomes clear that the provision in s. 68 is primarily intended to preclude the use by an opponent, of a document required to be attested unless he calls the attestor thereof. This provision is not intended to bar a party who admits to having signed same, from using the document under the general law of evidence.

In any event, though it is my habit to faithfully record virtually all submissions and points raised by Counsel during the hearing my records does not show any objections raised by Mr. Ghazi on the application of s. 68 or s. 70 of the Evidence Act, save in his written submission. This being the case, and as Mr. Ghazi had not objected to its admission, I allowed the admission of P4C on general principles of evidence governing the admission of documents. I must however hasten here to interpose, that the admission *per se* of P4C does not free the Court from having to determine its probative value, for being a document where the attesting witness has not been called to testify. I shall have to deal with this later in my judgment, as the plaintiff had in effect sought to use P4C as "a conveyance or other form of pre-existing title deed".

Mr. Lim had also submitted that the plaintiff was not challenged by Encik Ghazi in cross-examination as to her original ownership of the said properties. In criminal law the general rule is that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony, though there are exceptions to this rule. But in civil law, such failure to cross-examine does not necessarily entail acceptance of the witness's evidence, as civil proceedings are crucially governed by pleadings and on whom

the burden and the evidential onus of proof rests. Hence, in the current case, the abiding onus throughout the trial is on the plaintiff to prove ownership of the said properties, especially when there is clear and specific denial by defendants, of the plaintiff's title (registered proprietorship) to the said property (*vide* paragraph 1 of the amended defence).

Yet, I would have to bear in mind that to prove ownership she would have to show only on the balance of probabilities that she was Sun Yok Eng @ Boonsom Boonyanit and that she was the duly registered proprietress of the said properties.

I am mindful that the interim register of both the said properties as shown in the plaintiff's supplementary bundle of documents indicates a transfer, registered on 18 January 1967, of same from Messrs Eng Hong Trading Company Ltd. to one Sun Yok Eng @ Boonsom Boomyanit, but this document was not tendered or admitted in evidence and should be disregarded. However, I cannot ignore the fact that D19A and B adduced by the defendants themselves would go to show that one Sun Yok Eng @ Boonsom Boonyanit was, until the registration of the impugned transfer, the registered proprietor of the said properties. Though the plaintiff could not produce any legal documents to show that she was Boonsom Boonyanit @ Sun Yok Eng or Sun Yok Eng @ Boonsom Boonyanit I am inclined to accept her evidence, the evidence of PW2 (her son) and PW4 that she had a chinese name of Sun Yoke Eng, and that she was also known as Boonsom Boonyanit. And, the fact that the plaintiff had custody and could produce to the Court P11A and B (two bundles of xerox copies of quit rent receipts) and P12 (assessment receipts) together with the duplicate signed copy of the transfer Form 14A (P4C) dated 29 December 1966 - especially when such evidence is considered in conjunction with the evidence of PW2 and PW3 would be sufficient to satisfy the Court, on a balance of probabilities, that the plaintiff was the registered proprietress of the said properties, and I so hold.

*On the second issue*

As forgery is a specie of fraud and both are inter-related due to the common denominator of both being criminal in nature, this judgment would necessitate some discussion on the law on fraud.

It is settled that a very heavy onus is placed on the shoulders on he who alleges fraud, to clearly and distinctly prove it. It can never be based on suspicion and conjecture. Fraud raised in civil proceedings requires a higher standard of proof than that in ordinary matters, and it has been held in the celebrated English case of *Bater v. Bater* [1951] P35 that fraud in civil proceedings must be proved by a preponderance of probability and not on a balance of probability. In that case the *dicta* of Lord Denning - noted for his perceptive and analytical approach to complex issues - conveyed a studied avoidance of the expression "proof beyond reasonable doubt". This is what he had to say: "So also in civil cases, the case may be proved by a preponderance of probability, but there may be degree of probability within that standard. The degree depends on the subject-matter. A civil Court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal Court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion." Be it reminded that a criminal Court cannot convict on an evidential preponderance of probability. (See also *Nahar Singh v. Pang Hon Chin* [1986] 2 MLJ 141.) However, in Malaysia - post *Bater v. Bater* (s*upra*) - the probative value of evidence required to discharge the heavy onus of proof in cases of fraud has been settled in two landmark decisions of superior tribunals, namely, *M. Ratnavale*

*v. S. Lourdenadin, M. Mahadevan v. Lourdenadin* [1988] 2 MLJ 371 (Supreme Court decision) and *Chua Choon Moi v. Ngan Sew Tin* [1986] 1 MLJ 34 (a Federal Court decision), which held that fraud under s. 340(2)(a) of the National Land Code must be proved beyond reasonable doubt rather than by a preponderance of probability. In my view, as proof through the beyond-a-preponderance of probability test was clearly then in place for their consideration, the Supreme Court and the Federal Court, had demonstrably opted in favour of the beyond-reasonable-doubt test over the preponderance-of-probability test enunciated in *Bater v. Bater* (*supra*). This position of law in Malaysia (though not in England) was confirmed by the Privy Council in *Saminathan v. Pappa* [1981] 1 MLJ 121 when Lord Diplock who delivered judgment of the Board, said (at page 126). "The onus of proof of fraud in Malaysia is beyond reasonable doubt".

It is also my view that the beyond-reasonable-doubt test cannot in linguistics take two deferent meanings in civil as opposed to criminal proceedings. See also *Naravanan v. Official Assignee, Rangoon* AIR 1941 PC 93. Fraud, in order to succeed must be brought home to the party alleged of having committed fraud. Fraud should be such that the desired object of the alleged act is to cheat a man of his existing right; it should be actual and not constructive fraud, it should be dishonesty of some sort in which he is a party or privy and it implies a dishonest and willful act on his part to cheat a man of a known right. See *Tai Lee Finance v. Official Assignee & Ors.* [1983] 1 MLJ 81, *Waimiha Sawmilling Co. Ltd. v. Waione Timber Company Ltd.* [1926] AC 101. That a high degree of dishonesty and willfulness in the act is required to be proved, is well illustrated in *Waimiha's* case (*ibid*), where the Privy Council held that there was no fraud on the part of the registered proprietor in merely acquiring title with notice of an existing unregistered interest or in taking a transfer with knowledge that its registration will defeat such an interest. (See also *Mills v. Stokman* [1967] 116 CLR 61).

Neither Counsel for the parties herein nor the Court is able to locate any Malaysian authority concerning the probative onus of proof required in cases of forgery. Be that as it may, as forgery involves a high element of fraud, and is indeed, a specie of fraud under Common Law, with both being criminal in nature, I am of the considered opinion that he who alleges forgery should be required to discharge the same probative onus of proof as was established in *M. Ratnavale and Chua Choon Moi* (*supra*). I therefore hold that that is the probative onus or requisite standard of proof the plaintiff here would have to discharge to prove that forgery had been committed on P8, being proof beyond reasonable doubt and not proof on the balance of probability, which - in lighter vein and unorthodox language could perhaps be expressed as proof on the balance of curial suspicion based on indeterminate or inexact evidence.

*On the Third Issue*

Let us now examine the plaintiff's proof whether forgery had been committed on P8. Her case is that she did not sign P8 and her Thai international passport no. 080757 (P2) confirms that she was not in Malaysia on 7 April 1989 or thereabout when P8 was allegedly executed. And, she never held a Thai passport no. 003582 as stated in P8. However, the evidence considered as a whole fell short of proof directly on point to show that the signature of the transferor in P8 was not hers. When the Court is called upon to form an opinion as to the identity or genuineness of a handwriting, as in the current case, it is enjoined under s. 45(1) of the Evidence Act to submit itself to the opinions of persons specially skilled on the question and in that particular field. Thus, it is especially important to include in her repertoire of proving her case, the evidence of a handwriting

expert, as she has to be mindful of a heavy burden placed on her to prove forgery beyond reasonable doubt. This shortcoming in her evidence must be considered in conjunction with the fact that she could not produce the document of title which she had pleaded (in paragraph 4(f) of her statement of claim) was in her custody at all material times. It is not permissible for the Court to assume the position of a handwriting expert and endeavour on its own to compare the signatures (of the transferor) in P4C and P8, being also mindful that the considerable time lapse of over 22 years spanning the execution of the two documents could by itself produce apparently differing signatures. Further, as the solicitor Lim Huck Aik who attested the signature of the transferor in P4C was not called (and no explanation was given for his absence) to confirm that it was the plaintiff who signed P4C, it is impermissible to use the signature in P4C for purpose of comparison with the signature in P8. Thus, there is neither on P4C nor anywhere else, any verified signature of the plaintiff for comparison even by an expert, to enable the Court to make a positive finding on the question of whether the signature on P8 was a forgery. Again, the Court should never loose sight of the heavy burden placed on the plaintiff to prove her case of forgery on P8, not merely on the balance of probability but beyond reasonable doubt.

The plaintiff must be held bound by her pleadings and the issues of forgery are circumscribed by the particulars set out in her pleadings, particularly her averment that she had at all material times, custody of the document of title. See *M. Ratnavale v. S. Lourdenadin* (*supra*), *Yorkshire Provident Life Assurance Co. v. Gilbert & Ravington* [1895] 2 QB 148 and also *Abdool Hoosein v. Turner LP 14 - 1.A 111*. Mr. Lim had submitted that by virtue of s. 81(3) of the National Land Code (Penang and Malacca Titles) Act 1963, the transfer form 14A (P4C) was "the document of title" referred to. I disagree. Section 81(3)(a) provides that in the States of Penang and Malacca, a duly executed Form 14A may constitute an instrument of dealing to take effect "as though it were a conveyance or other form of pre-existing title deed". However s. 81(l) of the same Code also provides that "such instrument of dealing to a holding shall not be effectual until it has been registered ..". Thus until registered it is merely a conveyance of pre-existing title deed but certainly not "the original title deeds in respect of the said lands" as pleaded in paragraph 4(f) of the statement of claim. Furthermore, as P4C is required by law to be attested, in order to enable this document to be considered as "a conveyance or other form of pre-existing title deed" it must first be shown that this document was attested in accordance with the law, which the plaintiff, for her failure to call the attesting solicitor had failed to do. As D21A and D21B show that the plaintiff became the registered owner of the said lands on 18 January 1967, she must have been issued with the document of title in respect of both the said properties soon thereafter, yet there was no explanation from her as to why she could not produce to Court the relevant documents of title issued to her by the land registry.

I am also mindful of the letter dated 21 December 1993 (P10P from the Royal Thai Consulate, Penang which confirmed passport no. 033582 to be a forgery. Nevertheless, the probative value of P10 is weak as the maker of the document was not produced in Court for cross-examination; especially when it is also noted by the Court that part (two years) of the operative period in the passport P1 (effective from 4 May 1982 to 3 May 1987) overlapped with the period in another passport P2 (effective from 15 March 1985 to 14 March 1990). This would mean that the plaintiff was the holder of two passports during the period from 15 March 1985 to 3 May 1987, and consequently it is not improbable for her, similarly, to have held another passport covering part of the period in P2 and the period of the impugned transfer. And, as neither the original nor a certified

true copy of the allegedly forged Thai passport no. N033852 of Boonsoom Boonyanit (shown in the plaintiff's bundle of document) was sought to be adduced or admitted in evidence (through an authorised person from the Royal Thai Consulate), same does not merit the Court's curial attention.

It is also important for the Court to bear in mind that though the statutory declaration dated 6 April 1989 (P7) was sworn a day before the date of the transfer (in P8), D15 (the sale and purchase agreement dated 15 December 1988) nevertheless shows that the transfer was not a lightning transaction, but, was in fact the culmination of a transaction process which took about 8 months, involving various exchange of letters between the solicitors of the purchaser and the vendor during the intervening period; indeed a lengthy process which eventually led to an advertisement in the Thai newspaper on 11 June 1989 (P9A) notifying prospective claimants on the said properties, if any, to contact solicitors M/s Khor, Ong & Company.

The other point of material consideration is that, neither Arifin bin Awang, Penolong Pentadbir Tanah Daerah, Seberang Prai Tengah, Bukit Mertajam who attested the transfer dated 7 April 1989 (PB) nor the solicitor from Messrs Khor, Ong & Co. who represented Mrs. Boonsom Boonyanit in the said transfer was called to testify as to whether the plaintiff was the transferor/vendor who signed P8. Considering the heavy burden placed on the plaintiff's shoulders it is insufficient merely to assert that that signature was not hers and that she was not in Malaysia at the material time, but she ought to have called a signature expert and Encik Arifin Awang who attested P8 or the lawyer from M/s Khor, Ong & Co. to clearly and conclusively prove that she was not the person who signed as transferor in P8. Regretably, this onus she had failed to discharge within the standard required in *M. Ratnavale* (s*upra*).

Due to the nature and circumstances of the sale transaction it is unreasonable for the Court to expect the defendant's Counsel to challenge the plaintiff that she did sign P6, P7, D15 or P8. The Court has to be mindful of the common ground between the parties that: from the date of execution of D15 until the completion of the sale, the vendor and purchaser were represented by different solicitors; P8 was attested by the Penolong Pentadbir Tanah Daerah Encik Arifin bin Awang and was executed about eight months after D15 was signed, sealed and delivered; and a total sum of RM1,865,798 was paid to the vendor by the defendant for the said properties. It is also obvious that by virtue of P7, M/s Khor, Ong & Co. had at the material time held out that they represent the registered proprietor of the said properties, one Mrs. Boonsoom Boonyanit also known as Sun Yoke Eng @ Boonsom Boonyanit.

In conclusion, my view is that the sum total of the plaintiff's evidence may at the very most constitute circumstantial evidence, which may be sufficient to show on the balance of probability that her signature had been forged, but the nature of such evidence, short of independent affirmative evidence, is insufficient to found proof beyond reasonable doubt, of the falsity of the signature *per se* in P8. This surely is the crucial element of proof required when one alleges forgery, as forgery by its very nature, essentially concerns signatures rather than *alibi* of signatories - the focus in martialling evidence to prove forgery should not be misplaced. Be it noted that, in arriving at my decision I have adopted solely the beyond-reasonable-doubt test, although I am of the view that the plaintiff would have failed to establish forgery even had I applied the preponderance-of-probability test as in *Bater v. Bater* (*supra*) as they had not called any of the vital witnesses aforesaid.

I now turn to the fourth and last issue which - in the trite expression used in fraud - is whether it is necessary to bring home the allegation of forgery to the transferee/purchaser of the impugned transfer.

Thus, even assuming that I had found that forgery had been proven, the question which then arises is: whether the defendant could claim protection as a *bona fide* purchaser for value under the proviso in s. 340 (3) of the National Land Code. In order to discover the intention of the legislature it is necessary to construe s. 340 of the National Land Code in the light of its precursor s. 42 of the repealed FMS Land Code (Cap. 138). In his written submission Mr. Lim had contended that s. 340 sub-section 2(b) of the National Land Code is in *pari materia* with s. 42 of the former FMS Land Code, in that a forged document is a nullity *ab initio* and can pass no title or interest. Mr. Lim had also contended that unlike the case of fraud the proviso in s. 340 (3) of the National Land Code affords deferred and not immediate protection to a *bona fide* purchaser for valuable consideration. He found support in this contention from the authors of two textbooks namely David Wong on *Tenure and Land Dealings in Malay States* and Teoh Keang Sood and Khaw Lake Tee on *Land Law in Malaysia* - cases and commentary.

The author of the first textbook Mr David Wong opined at page 361 of his work as follows:

> Forgery as a ground for vitiating a registered title, as set out in s. 340(2)(b) of the Malaysian National Land Code, marks a focal point of difference between the Malaysian Torrens system and those where *Frazer v. Walker* [1967] AC 569 applies. In *Choo Loong v. Lip Kwai Kow* [1930] 7 FMSLR 213 a person by a trick induced an illiterate proprietor of land to hand her grant (document of title) to him, and created a registered charge in favour of another person by way of a forgery. The proprietor succeeded in this action for an order to have the charge cancelled. In *Ong Lock Cho v. Quek Shin & Sons Ltd.*, [1941] 10 MLJ 88 a registered proprietor entrusted his document of title to his solicitor for the purpose of creating a charge. A clerk in the solicitor's firm by forgery created a different charge in favour of another person. It was held that the forged charge was a nullity and must be set aside. These two cases were decisions under s. 42 of the former FMS Land Code which as has been noted was substantially similar to the present s. 340. (Emphasis added)
>
> Even prior to the former FMS Land Code, when the early Registration of Titles legislation in its principal "indefeasibility" provision only specified "fraud" and "misrepresentation" as the exceptions thereto, the courts in the Malay States had recognized forgery as a ground for defeating a registered title. In one of these decisions, namely *Ong Lian v. Tan Eng Jin* [1917] 1 FMSLR 325, it was held by the Court of Appeal that a *bona fide* purchaser for value, taking from a proprietor who had come onto the register by registration of a forged transfer, acquired an indefeasible title. The protection for subsequent purchasers is now clearly provided for by the present s. 340(3).
>
> It will be realized that "forgery" under the Malaysian provision is a distinct ground on its own. The Singapore Land Titles Act, Cap. 276, also expressly sets out "forgery" as an exception to indefeasibility, but places "forgery" side by side with "fraud" subject to the same limitation, *viz.*, that for a registered title to be vulnerable in either case the proprietor (or his agent) must be a party to or have collided in the "fraud" or "forgery". This would appear to treat forgery as a species of fraud. Under the Malaysian provision, the very fact of forgery suffices by itself in making a registered title defeasible irrespective of the absence of knowledge or implication on the part of the proprietor. In other words, it affects the immediate proprietor even if he be an innocent purchaser for value.

The case of *Frazer v. Walker* cited by Mr. David Wong in the above excerpt, has settled two points. First and foremost, the Privy Council has finally pronounced in favour of immediate indefeasibility. Their Lordships have laid down the principle that registration

of an instrument which is forged, or which is void for any other reason, is effective to vest and to divest title and to protect the registered proprietor against adverse claims. Secondly, it has settled that a *bona fide* purchaser for valuable consideration of an estate in fee simple who buys from a mortgagee who is exercising the power of sale under the mortgage is entitled to the protection to the same extent as if that *bona fide* purchaser had taken title direct from the registered proprietor of the estate in fee simple. In *Frazer v. Walker* (*supra*) the Privy Council plainly wished to settle the conflict of opinion which had for so long centred round its earlier statement about indefeasibility of title in *Gibbs v. Messer* [1891] AC 248 and Assets *Co. Ltd. v. Mere Roim* [1905] AC 176. From the way in which their Lordships approached the case it would seem abundantly clear that they intended to decide whether indefeasibility is immediate or deferred, and based their advice firmly on the ground of the immediate indefeasibility of Mr. and Mrs. Radomski's title as mortgagees of Mr. Frazer's interest in the land. However, the authors of the two textbooks on land law have opined that the principle enunciated in *Frazer v. Walker* on the issue of forgery is no longer good law under the new s. 340 of the National Land Code.

In further support of the plaintiff's contention on this point, the authors of *Land Law in Malaysia* had this to say (at page 131) concerning s. 340(2)(b) of the National Land Code:

> Where registration is obtained by forgery, the registered title or interest of that person or body who is a party or privy to the forgery is defeasible by reason not only of fraud but of paragraph (b) of subsection (2) of s. 340. The paragraph would also appear to apply even where the person or body is not a party or privy to the forgery. The position as regards the effect of registration obtained by way of forgery under the National Land Code 1965 is thus different from that of other Torrens jurisdictions. In these jurisdictions, in the absence of fraud, registration of a forged or void instrument confers an indefeasible title or interest. This is what is commonly referred to as immediate indefeasibility as opposed to deferred indefeasibility where, as under the Code, even in the absence of fraud, registration of a forged or void instrument will not confer indefeasibility.

And also at page 145

> Indefeasibility will, however, attach to the title or interest once it is acquired by a subsequent purchaser in good faith and for value or by any person or body claiming through or under such purchaser. (See *Doshi v. Yeoh Tiong Lay* [1975]1 MLJ 85).

I disagree with the above opinion expressed by the academic writers in textbooks as such opinion can hardly be justified if careful regard is had to the relevant provisions in the old Land Code and the new Land Code. Thus, for proper consideration of this issue, it is essential for the Court to analyse and examine critically, s. 42 of the FMS Land Code on the one hand and s. 340 of the National Land Code on the other, in order to bring out their essential elements, structured as they are, in the manner expressed in both provisions.

Section 340 of the National Land Code (new s. 340) states as follows:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible
>
> (2) The title or interest of any person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy;

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

Section 42 of the FMS. Land Code (old s. 42) provided as follows:

(i) The title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided.

(ii) In the case of fraud or misrepresentation to which he is proved to be a party the title of such proprietor, chargee or lessee shall not be indefeasible.

(iii) If the registration of any proprietor, chargee or lessee has been obtained by forgery or by means of an insufficient or void instrument such registration shall be void.

(iv) Nothing in sub-sections (ii) or (iii) shall affect the title of a proprietor, chargee or lessee who has taken *bona fide* or valuable consideration from any proprietor, chargee or lessee whose registration as such was procured by any such means or by means of any such instrument as aforesaid or of any person claiming *bona fide* through or under him.

The old s. 42 (ii) provides that the title of a proprietor in the case of a fraud "to which he is proved to be a party" shall not be indefeasible whereas sub-section (iii) expressly states that the registration of a forged instrument shall be void, though sub-section (iv) gives protection to a proprietor who has taken *bona fide* title for valuable consideration from a proprietor whose registration as such has been procured by fraud or forgery. Thus, a proprietor who has taken *bona fide* in the case of fraud is not caught by subsection (iii) of the old s. 42 whereas in the case of forgery the transfer is *void ab initio* and he obtains no title. There is thus, by virtue of subsection (iv) of s. 42, expressed statutory protection given to such *bona fide* purchaser in respect of a void instrument (for being forged) solely on the basis of deferred but not immediate indefeasibility; considering that under subsection (iii) a forged instrument was a void instrument that conferred no title to the first registered owner.

The provisions in both s. 340(2)(a) and s. 42(ii) in regard to fraud are similar, in that a title shall not be indefeasible if the person or body was a party or a privy to the fraud. But, in regard to forgery, s. 340 subsection (2)(b) (in contrast with s. 42(iii)) merely states that the title registered in such manner shall not be indefeasible, rather than shall be void. Thus, it is highly significant that unlike the old Land Code, the new Land Code provides that registration obtained by forgery shall not be indefeasible rather than shall be void. By adopting this different approach in the new National Land Code, the intention of Parliament is clearly to protect parties who are *bona fide* and hence, to provide immediate indefeasibility to such innocent parties. Furthermore, the words "any purchaser"

in the proviso to s. 340(3), which sub-section is expressed to also include any of the circumstances specified in sub-section (2), would seem to cover any purchaser who has acquired property in good faith and for valuable consideration, through forgery, fraud or misrepresentation.

The absence of the words "was a party or privy" (appearing in s. 340 (2)(a)) in s. 340 (2)(b) are not strong enough to persuade me to take a different view. Such absence could not have been a deliberate and considered omission, as the legislature under the new Code has in no uncertain terms placed both fraud and forgery on the same platform on the question of defeasibility and voidability.

To say that the absence of the words "as a party or privy" is of crucial importance is completely to ignore the rationale and deliberation which led to the decision by the Privy Council in the case of *Kesaramal & Anor v. Paliappa Chettiar* [1954] 20 MLJ 119. That case concerned the setting aside of an instrument due to duress pursuant to s. 27 of the Titles to Land (occupation) Ordinance 1949. The substantive issue before the Court was whether it is essential for setting aside a registered title on the ground of duress, under that section (s. 27), that the person taking the title should be aware of the duress. Both parties agreed that the said land concerned is subject to the provisions of the FMS Land Code, in which s. 42 (ii) provides that "in the case of a fraud or misrepresentation in which he is proved to be a party the title of such proprietor, chargee or lessee shall not be indefeasible". In contrast, s. 27 makes no mention about being a party to a duress. Notwithstanding this, the Privy Council still went on to hold that knowledge of duress on the part of transferee must be established before the transferor can succeed to have the registration of the transfer under the old Land Code set aside on the ground of duress by virtue of s. 27. The Privy Council alluded to the expression "shall not be indefeasible" in the section and pointed out that the same expression was employed in s. 42(ii) of the former Land Code relating to the case of "fraud and misrepresentation". Their Lordships at the same time noted a different expression, *viz*., "registration shall be void", being employed in s. 42(iii) of that Land Code relating to cases of "forgery" etc. Observing that these different expressions could not "mean identically the same thing", their Lordships then took the view that as the Ordinance only stated that the title would be "vulnerable" (but "had not been defeated"), "recourse must be had to the ordinary law" as to the question of knowledge. In consequence, their Lordships held that knowledge of duress on the part of the transferee must be established before a transferor could claim to be entitled to have the title set aside. Their Lordships also pointed out that the presence of the words "to which he is proved to be a party" in s. 42(ii) of the Land Code (which were absent in s. 27 of the ordinance) was not strong enough to persuade them to take a different interpretation.

Thus, the potent hangover effect of the old s. 42(ii) on the interpretation of the new s. 340(2) and (3) is evident from the views expressed in the two above works on land law.

Also, Judith Sihombing in her work, *National Land Code - A Commentary* (2nd Edition) had this to say, at page 817:

> Under the immediate indefeasibility principles, registration of the transfer would have given indefeability because 'it is in fact registration and not its antecedents which vests and divests title' (*Frazer v. Walker* [1967] 1 AC 569 at page 580). However, our system is that of deferred indefeasibility wherein forgery is expressly treated as a vitiating factor.

and at page 819 she added:

> In the first edition (at page 281) it was suggested that the remarks of the Federal Court in *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85 in applying immediate indefeasibility were contrary to the terms of s. 340. Nothing has since occurred which would alter this assumption and the decision should be read restrictively on this point. The reason for respectfully doubting these remarks is that the Court seemed to ignore this sub-section and granted indefeasibility to a void instrument.

Her criticism of the Federal Court decision in *Doshi* (*supra*) is unwarranted as in that case the impugned transfer was effected on 31 March 1972 after the National Land Code came into effect (on 1 January 1966 by L.N 474/1965), whereby transfers of fraudulently procured instruments as well as forged instruments were merely treated as a vitiating factor, and therefore voidable but not void. Hence, to hold the view that the Federal Court had granted indefeasiblity to a void instrument, is to ignore the fact that Federal Court had quite correctly focussed it's mind not on the nature of the instrument itself but on the effect of registration of such instrument (e.g. an instrument procured by fraud or forgery) as enjoined under s. 340 of the National Land Code. All the more so, if we are to accept the principle re-affirmed in the celebrated decision of the Privy Council in *Frazer v. Walker,* (*supra*) that it is not the instrument but the registration which is effective to vest and divest title and to protect the registered proprietor against claims. In any event, under the new s. 340 a forged instrument is not a "void instrument" but rather a voidable instrument.

My view is further fortified by sub-section (3) of s. 340 which provides that nothing in the sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or any person or body claiming through such a purchaser. It is clear from this that the expression "any purchaser" should include a first purchaser/ transferee, (immediate indefeasibility) and the word "or" before "by any person or body claiming through such purchaser" in the second limb of the proviso should be read disjunctively to mean a subsequent purchaser (deferred indefeasibility). Thus, the operative words "any purchaser" and not "any subsequent purchaser" makes clear the legislature's intention to grant immediate and not merely deferred indefeasibility to a purchaser in good faith for valuable consideration.

The other interesting point that arose in the process of my deliberations on the question of immediate or deferred indefeasibility concerns general principles. As the power of the Court to grant an equitable relief by way of a declaration is wholly discretionary, surely whether the transferee (defendant here) was a party or privy to the fraud would be of material and crucial consideration when a Court considers whether or not to exercise such discretion. This ought to be so, at least in so far as the equitable relief sought in prayer 5(l) of the statement of claim is concerned. And my view is that the statutory relief prayed for in prayer 5(2) of the claim, for rectification of the transfer could not stand by itself and is untenable if bereft of such a declaration. It is precisely for this reason that I hold the view that unless the statute expressly declares the transfer to be void (as under s. 42(iii) of the old Land Code, for forgery) the common law principles ought to apply.

For the above reasons, I hold that even had I found that forgery had been proved beyond reasonable doubt, the defendant is nevertheless protected and has acquired indefeasible title over the said properties by virtue of the proviso in s. 340 (3) of the National Land Code. Thus, the law on forgery obtaining in other torrens systems is also applicable in our torrens system. It is true that registered landowners should be protected from being divested of their registered interest through fraud or forgery, yet it is also necessary, for the economic well-being of the nation to retain the confidence of prospective innocent purchasers of landed property.

For all the above reasons I dismiss the plaintiff's claim and I award costs of this proceedings to the defendant. Upon the oral application of the defendant now made, I order that the registrar of Land Titles remove the Registrar's respective caveats against the said two properties, and I also allow the plaintiff an Erinford stay of this judgment pending formal application within 14 days from date hereof.

This Court would also wish to place on record its appreciation to all the four Counsel on their research (though it drew a blank in terms of case law on forgery); to mention in particular, Mr. Ghazi's lenghty written submission and his further written reply, though in both his written submissions he was somewhat at sea on the question of immediate and deferred indefeasibility pertaining to forgery. Admittedly, this case seems tailor-made to draw the sweat out of Counsel and Judge alike. However, if only for development of the law it is hoped that this decision is taken up for consideration by the higher tribunal on three points, namely clarification on the question of whether the beyond-reasonable-doubt probative burden of proof required in cases of fraud in a civil Court is precisely the same as in a criminal Court since the Courts seem to have rejected the preponderance of probability test; whether the standard and burden of proof required in cases of forgery is the same as in fraud; and whether the ambit of the protective proviso in favour of *bona fide* purchasers in s. 340(3) of the National Land Code also covers forgery. It is to this end that this written judgment would be made available to the parties today, immediately after it is read. And, for the same reasons this Court will be ill inclined to place any impediment on the plaintiff should she be minded to appeal against my judgment.